

Technical Advisory Note – Repatriation request for the Yaqui Maaso Kova

Expert Mechanism on the Rights of Indigenous Peoples

16 June 2020

I. Engagement and outcome

Introduction

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was established by the Human Rights Council, the United Nations' main human rights body, as a subsidiary body of the Council, pursuant to resolution 6/36 (2007), as amended in resolution 33/25 (2016).

Pursuant to its mandate, the Expert Mechanism provides the Human Rights Council with expertise and advice on the rights of indigenous peoples as set forth in the United Nations Declaration on the Rights of Indigenous Peoples, and assists Member States, upon request, in achieving the ends of the Declaration through the promotion, protection and fulfilment of the rights of indigenous peoples.

More specifically, the Expert Mechanism is mandated to:

- (a) Upon request, assist Member States and/or indigenous peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples, as relevant, which may include establishing contacts with other United Nations agencies, funds and programmes;
- (b) Provide Member States, upon their request, with assistance and advice for the implementation of recommendations made at the universal periodic review and by treaty bodies, special procedures or other relevant mechanisms;
- (c) Upon the request of Member States, indigenous peoples and/or the private sector, engage and assist them by facilitating dialogue, when agreeable to all parties, in order to achieve the ends of the Declaration.

Summary of the request

This request centers on the Maaso Kova (ceremonial deer head), a sacred cultural item of the Yaqui People currently held by the Museum of Ethnography, which forms part of the Swedish National Museums of World Culture (the Museum or NMWC). The International Indian Treaty Council (IITC) requested EMRIP to intervene in an advisory capacity in order to encourage Sweden to take steps towards the repatriation of the Maaso Kova, potentially along with other items held in the Museum's Yaqui Collection, pursuant to the UN Declaration on the Rights of Indigenous Peoples, as follows:

Article 11

- (1) Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
- (2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious

and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

(1) Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

(2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 31

(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

(2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

More broadly, the request also invited EMRIP to provide guidance on the establishment of processes or mechanisms for the international repatriation of indigenous peoples' cultural heritage, particularly sacred items and human remains under Declaration.

EMRIP's key engagements on this request

Accordingly between 2018 and 2020, the Expert Mechanism worked with the Yaqui parties and Swedish Government to identify and elucidate the issues between them, working toward dialogue. (The details of this engagement, including the issues raised, analysis provided, and contacts made over the two years, are provided below in Part II.) The parties ultimately agreed to participate in a day-long dialogue facilitated by the Expert Mechanism on 6 March 2020 in Vancouver, British Columbia, Canada.¹ While the dialogue was held privately, the parties have agreed to share the agreement that they reached.

¹ This dialogue followed a two-day public seminar on Repatriation of ceremonial objects and human remains under the UN Declaration on the Rights of Indigenous Peoples held at the University of British Columbia on 4 and 5 March 2020. The proceedings of the seminar will be reflected in a report of the Expert Mechanism entitled Repatriation of ceremonial objects and the human remains of indigenous peoples under the UN Declaration on the Rights of Indigenous Peoples, which will be submitted to the Human Rights Council at its 45th session in September 2020. The Expert Mechanism thanks the University of British Columbia, and in particular the First Nations House of Learning, for support in making these events possible.

Agreement between the Yaqui and Swedish Parties

On 6 March 2020, the parties agreed in principle to the following:

The Expert Mechanism will convey to the Government of Mexico the outcome of this dialogue, in particular that the parties welcome initiating a process of repatriation of the Maaso Kova and parts of the Museum’s Yaqui Collection to the Yaqui People in Mexico. This repatriation would be facilitated by the Ministry of Foreign Relations of Mexico (Secretaría de Relaciones Exteriores), in consultation and cooperation with the relevant federal agencies, including the National Institute for Indigenous Peoples (Instituto Nacional de los Pueblos Indígenas – INPI) and National Institute of Anthropology and History (Instituto Nacional de Antropología e Historia – INAH), as well as the Traditional Authorities of the Yaqui Ocho Pueblos and the Maaso Kova Committee, with their free, prior, and informed consent.

A request for repatriation to the Swedish National Museums of World Culture could occur pursuant to the UNESCO 1970 Convention, article 15, which permits special agreements for restitution between parties regarding cultural property removed from their territories before the entry into force of the Convention, and UN Declaration on the Rights of Indigenous Peoples article 12, which recognizes the right of indigenous peoples to the use and control of their ceremonial objects, and that states shall seek to enable the access and/or repatriation of ceremonial objects in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

This request must comply with the laws of Sweden and Mexico, and the laws, customs and traditions of the Yaqui People. In particular, repatriation may be permissible under Swedish law and policy permitting repatriation for “special ethical reasons”.

Following resolution of this matter in a manner amenable to all parties, the Yaqui People and the Museum intend to collaborate on interpreting the collection of Yaqui material in the Museum’s collection, with the intention of healing relationships and fostering collaboration. This collaboration will help the Museum fulfill its mission to educate and engage on world cultures.

II. Detailed Review of the Events, Issues, and Analysis

The key points of the Expert Mechanism's engagement with the Yaqui People and Swedish Government are described above. Additional detail on the chronology of events, as well as issues identified by the parties and certain points of analysis are provided here, both as a record of this engagement for the parties and as information for others who may be interested.

Chronology of key events from receiving the request (from EMRIP's perspective)

February 2018: The Expert Mechanism received the original request from the IITC.

October 2018: The Expert Mechanism informed the IITC that they had accepted to work on this request, with the objectives of EMRIP's engagement being to:

1. Facilitate dialogue and provide technical advice regarding the repatriation of the Maaso Kova
2. Provide technical expertise and capacity building regarding international repatriation more broadly, toward meeting the aims of UNDRIP Articles 11, 12, and others, geared not only to the direct parties but also ICOM, UNESCO, WIPO, and others.

November 2018: Following feedback from the Expert Mechanism, the IITC sent a revised request. The Expert Mechanism subsequently informed Sweden, through its Permanent Mission at the United Nations at Geneva that it intended to work on this request.

December 2018: The Ministry of Culture of Sweden informed the EMRIP secretariat that the request would be handled by the leadership of the Swedish National Museum of World Cultures.

March 2019: Letter from Ann Follin, the Director of the Swedish Museum of World Cultures, which set out the Museum's initial position on the request.

April 2019: The Expert Mechanism met informally with the IITC, Pascua Yaqui Tribal Vice-Chairman and member of the Maaso Kova Committee from Arizona and the Mexican Government (Instituto Nacional de los Pueblos Indígenas) on the margins of the UNPFII session in New York.

July 2019: The Expert Mechanism held informal meetings with the Permanent Mission of Sweden to the UN in Geneva and with representatives of the IITC and the Yaqui People.

September 2019: The Expert Mechanism held an informal meeting with the Permanent Mission of Sweden to the UN in Geneva, including Ambassador Veronika Bard.

November 2019: The Expert Mechanism held a conference call with the Museum's leadership in order to discuss the request. The Museum agreed in principle to a dialogue with the IITC and the Yaqui People, facilitated by EMRIP, to be held in March 2020 on the margins of the Expert Seminar on International Repatriation in Vancouver, Canada.

December 2019: The Expert Mechanism sent letters to both parties confirming their respective agreement to hold a dialogue and requesting additional information.

January 2020: Both parties submitted extensive correspondence and documentation in response to EMRIP's request for additional information.

February 2020: The Expert Mechanism held informal telephone meetings with both parties to prepare for the dialogue. The Expert Mechanism followed up with the Federal Government of Mexico, through the Ministry of Foreign Affairs, to address concerns that were raised in the telephone meetings.

4-5 March 2020: An Expert seminar on the repatriation of ceremonial objects and human remains under the UN Declaration on the Rights of Indigenous Peoples took place in Vancouver, Canada, hosted by the University of British Columbia. Along with several dozen other participants, representatives of the Museum and Yaqui People were panellists at this event.

6 March 2020: The Expert Mechanism facilitated an in-person dialogue between representatives of the Ocho Pueblos of the Río Yaqui (Sonora, Mexico), the Pascua Yaqui Tribe (Arizona, United States of America), the International Indian Treaty Council, and the leadership of the Swedish Museums of World Culture.

Background for the request: The international movement and global expectations in favour of repatriation²

The world community has long understood the importance of the protection of cultural property, which consists of items both tangible and intangible that express human identity, affinities, and values, especially on a group level. This understanding has led to the development and adoption of international legal instruments on this matter.

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property provides for states to prevent the taking or misappropriation of one another's cultural property, to admit actions for lost or stolen cultural property, and to enter into special agreements for restitution of cultural property illicitly acquired. The 1970 Convention is meant to prohibit trafficking and facilitate repatriation in some cases.

The International Council of Museums' Code of Ethics provides some guidance on contemporary repatriation as well. For example, in paragraph 6.2 the Code of Ethics states that "Museums should be prepared to initiate dialogue for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level".

The situation of indigenous peoples lends complexity to the law and ethics of repatriation. For hundreds of years in many countries, indigenous peoples' human remains and cultural objects were taken from them by armies, collectors, scientists, and others. These items were often transferred to museums and displayed as art or artefacts. The injuries to indigenous peoples were severe, including loss of dignity at burial sites, difficulty practicing spirituality without necessary religious items, and inability to carry out cultural obligations to care for the dead and ceremonial objects. In the international arena, if indigenous peoples' cultural property was protected at all, it was under the rubric of national patrimony. But such repatriations from one country's museum to another did not usually resolve or address indigenous peoples' own cultural rights and needs.³

The contemporary indigenous peoples' rights movement has made clear that indigenous peoples' cultural, religious, and property rights require repatriation of their human remains and cultural objects directly to them. Indigenous peoples' interests are often distinct from those of the state where they

² For further background, please refer to the Expert Mechanism's report on Repatriation of ceremonial objects and human remains under the UN Declaration on the Rights of Indigenous Peoples (forthcoming in July 2020).

³ <https://www.bbc.com/news/world-latin-america-12438695>

reside. Indigenous peoples have their own laws, customs, and traditions on the usage of cultural property and often retain an ongoing need to use or care for such items pursuant to religious or spiritual requirements. States and the international community have come to understand these claims as emanating from indigenous peoples themselves, according to their laws, and from the perspective of living cultures.

The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007, reflects these trends. The Declaration recognizes that indigenous peoples have their own rights to religious, spiritual, and cultural property. These rights are not derivative of states' rights and they do not end at national boundaries.

More specifically, Article 11 of the Declaration recognizes "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs... This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as ... artefacts". Additionally "states... shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

Article 12 is arguably broader because it does not limit repatriation to property taken without consent or in violation of indigenous peoples' laws, customs and traditions. Recognizing the right of "indigenous peoples... to manifest their spiritual and religious traditions," and the right to "the use and control of their ceremonial objects," Article 12 provides "states shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."

The challenge now is to implement the terms of the Declaration. Several guideposts may assist in this regard. In 2014, the international community reaffirmed its support for the United Nations Declaration on the Rights of Indigenous Peoples at the World Conference on Indigenous Peoples. The outcome document of the World Conference explicitly addresses the issue of repatriation in paragraph 27, which reads as follows:

We affirm and recognize the importance of indigenous peoples' religious and cultural sites and of providing access to and repatriation of their ceremonial objects and human remains in accordance with the ends of the Declaration. We commit ourselves to developing, in conjunction with the indigenous peoples concerned, fair, transparent and effective mechanisms for access to and repatriation of ceremonial objects and human remains at the national and international levels.

At its 17th session (2018), the United Nations Permanent Forum on Indigenous Issues encouraged States, indigenous peoples and other stakeholders to continue to engage in dialogue aimed at achieving the recognition of indigenous peoples' right to repatriation of their human remains and sacred items and called for the establishment of a UN mechanism for international repatriation (E/2018/43, para. 57).

The Expert Mechanism also addressed this issue in its 2015 study on indigenous peoples and the right to cultural heritage, identifying some of the challenges inherent in the repatriation of ceremonial items and human remains, as well as some promising developments at national and international level (see A/HRC/30/53, paras 69-73 and Annex, paras 8, 19 and 20).

UNESCO's 2015 Recommendation concerning the protection and promotion of museums and collections, their diversity and their role in society sets out global guidelines for the protection and promotion of museums and collections, and outlines their responsibilities in protecting heritage in all its forms. Paragraph 18 states:

In instances where the cultural heritage of indigenous peoples is represented in museum collections, Member States should take appropriate measures to encourage and facilitate dialogue and the building of constructive relationships between those museums and indigenous peoples concerning the management of those collections, and, where appropriate, return or restitution in accordance with applicable laws and policies.

UNESCO's 2018 Policy on engaging with indigenous peoples includes the right to repatriation of human remains and ceremonial objects as one of the policy provisions emanating from the Declaration that UNESCO commits to respect, protect and promote.

In 2018 the European Parliament adopted a wide-ranging resolution calling on the European Union and member states to address indigenous people's rights. It specifically expressed "support for indigenous peoples' requests for international repatriation and the establishment of an international mechanism to fight the sale of indigenous artefacts taken from them illegally, including through financial assistance under the European Instrument for Democracy & Human Rights (EIDHR)."⁴

Finally, Human Rights Council resolution 42/19, adopted on September 26, 2019, "Encourages the development of a process to facilitate the international repatriation of indigenous peoples' sacred items and human remains through the continued engagement of the United Nations Educational, Scientific and Cultural Organization, the World Intellectual Property Organization, the Expert Mechanism, the Special Rapporteur on the rights of indigenous peoples, the Permanent Forum on Indigenous Issues, States, indigenous peoples and all other relevant parties in accordance with their mandates."

As these processes for developing a global process unfold, individual matters regarding indigenous peoples' claims for repatriation, as in the current matter involving Sweden and the Yaqui, are also taking place.

The Maaso Kova

The Maaso Kova is a ceremonial deer head worn by a Yaqui deer dancer in a sacred Yaqui ceremony. The Maaso Kova held by the Museum has been consecrated and is therefore considered by the Yaqui to be a sacred living being. Yaqui cultural leaders point out that the Maaso Kova "is not an historic or anthropological artefact but a sacred living element of the Yaqui culture" and in their view it should not be on display for public viewing. The traditions, laws and customs of the Yaqui culture and religion do not permit a consecrated Maaso Kova to be in possession of anybody outside of the Yaqui religious society of the deer dancer (*Kolensia*).

The Yaqui were subject to an extermination campaign and suffered deportation from their traditional homeland in Sonora in the 19th and early 20th centuries. Destinations included Yucatán, Oaxaca and Veracruz, for forced labour on haciendas, as well as forced conscription for military service in several parts of Mexico, including Tlaxcala.

⁴ https://www.europarl.europa.eu/doceo/document/TA-8-2018-0279_EN.html.

The Maaso Kova was collected by two Danish anthropologist sisters, Bodil Christensen and Helga Larsen in Tlaxcala, Mexico, in 1934, and has been held by the Museum of Ethnography as item 1937.19.0113 since 1937. Tlaxcala is over 1750km away from the Yaqui homeland in Sonora and was home to a military garrison to which Yaqui soldiers had been conscripted. Their battalion was under the command José Amarillas, a Yaqui General serving in the Mexican Army. The armed conflict between the Yaquis and Mexico was ongoing at this time, and finally ended with the Decree of 1939 by Mexican President Lazaro Cardenas that recognized the Yaqui land base and allowed them to return home to Sonora.

The Museum's research on the Maaso Kova confirmed that the object came from Tlaxcala and was acquired by the Danish anthropologists directly from the Yaqui through an acquaintance with General José Amarillas. The Museum "made the assessment that there seems to have been a mutual friendship between the parties". Indeed, the correspondence shows that after the acquisition, the two sisters paid more visits to Tlaxcala and eventually helped General Amarillas travel back to Sonora years later.

The correspondence from Helga Larsen speaks of a strained relationship between General Amarillas and the "Chieftain of the tribe", known as *La Pluma Blanca*.⁵ The General's position and role is also mentioned in the letter from Bodil Christensen to Sigvald Linné of 17 June 1938, in which she states "Their High Chief, La Pluma Blanca, lives in Sonora. Our General doesn't have a formal position within their own organisation, but he is the middle man between all Yaqui and the government but he *cobrerere* (sic.) the monthly fee, that the government pays the Yaqui to remain calm."

The Museum's research concluded that the object "was acquired from the legal owners in Mexico in a legal and voluntary manner during a scientific expedition that brought the objects from Mexico to Sweden." The Museum further stated that this export was not in violation of any applicable laws on cultural heritage in place in Mexico in 1934. The museum's view was that "the Maaso Kova and other items acquired at the same time were given as gifts and that several of them were newly crafted at the time, with the intention to be gifts or to be sold".⁶

In 2003 Andrea Carmen, a member of the Yaqui Nation and Executive Director of the IITC attended an event at the Museum of Ethnography and saw the Maaso Kova on display. The Maaso Kova has since been removed from display by the Museum. Later in 2003, Rogelio Valencia, Chairman of the Yoemem Tekia Foundation contacted the Permanent Mission of Sweden in Geneva to request a dialogue with the Swedish Government through the IITC regarding the request to return the Maaso Kova. Ms. Carmen was instructed by the Permanent Mission of Sweden in Geneva to contact the National Museums of World Culture, who were the appropriate authorities to deal with this matter on behalf of Sweden.

The efforts for repatriation began in earnest in January 2014. By request of the Yoemem Tekia Foundation, Ms. Carmen contacted the National Museums of World Cultures with a request for repatriation under Article 11.2 of the UN Declaration on the Rights of Indigenous Peoples, which calls for the restitution of religious property of indigenous peoples taken without their free, prior and informed consent or in violation of their laws, traditions and customs. The Museum considered this claim to be informal, due to the lack of a formal request under article 7b ii of the UNESCO 1970 Convention. Notwithstanding this fact, the Museum launched an internal investigation in 2014, reviewing written and photographic records and reaching the conclusion that grounds for return were

⁵ See Helga Larsen to Gösta Montell and Sigvald Linné 1935-05-31

⁶ Report regarding the Maaso Kova transmitted by the Museum to the Expert Mechanism on 27 January 2020

insufficient. The request was denied and the decision was communicated to Ms. Carmen on 13 February 2014.⁷

Subsequent exchanges in 2016 led the Museum to re-examine the case, concluding that “there is no ground for a return, neither on the basis of legislation, nor considering professional or scientific principles.” The Museum further indicated that “this object was acquired from the legal owners in Mexico in a legal and voluntary manner during a scientific expedition that brought the objects from Mexico to Sweden.”⁸ The Museum further noted that, in order to assess the remaining criterion, the so-called humanitarian principles, a more thorough investigation of complex relationships in contemporary times had to be made. The museum welcomed a constructive dialogue with the Yaquis in both Mexico and the United States.⁹

The requesters noted, however, that the object was obtained in Tlaxcala from Yaquis who had been forcibly removed from their ancestral lands during a time of war. This point is also supported by an academic expert who wrote: “Despite the fact that the documentation demonstrates that the purchase of these objects from the Yaqui and their shipment to Sweden was not illegal, the Swedish expedition took advantage of the conditions of vulnerability of the Yaquis who were in Tlaxcala deported due to the war and emotionally depleted”.¹⁰

The Yaquis stated that under their laws, customs, and traditions, a consecrated Maaso Kova could not be purchased, gifted, or otherwise alienated to anyone other than a member of the Kolensias and that women would not be allowed to possess or touch this item. In its statement of 23 January 2020, the Maaso Kova Committee makes the following crucial points about Yaqui laws and customs regarding the Maaso Kova:

- A consecrated Maaso Kova like the one held by the Swedish Museums of World Culture that has been used and blessed in the deer dance is a sacred living being with its own life and spirit. It is treated by Yaquis as a most respected and beloved relative.
- The Deer Dance takes place in certain ceremonies, at certain times of the year. This is the sacred responsibility and obligation of the society entrusted with conducting this ceremony, regardless of the circumstances in which they find themselves.
- The traditions, laws and customs of the Yaqui do not permit a consecrated Maaso Kova to be in possession of anthropologists, museums, government or military officials, or anyone else outside the Yaqui ceremonial society of the deer dancer (Kolensia). It emerges at the time of ceremonies in which its participation is required. It is not meant to be on display for public viewing or to be kept outside the Yaqui culture.
- The Kolensia society is a men’s society. Women, Yaqui or otherwise, do not touch or possess a consecrated Maaso Kova. It is not possible that a consecrated Maaso Kova would willingly be given or sold to a woman by a deer dancer or other member of the Kolensia. A consecrated Maaso Kova is only passed down to a younger deer dancer being trained by his elders to take his place in that society. It would never be freely and willingly given to anyone outside of that society.

The Museum’s understanding was that “the same Yaqui law, regarding the handling and gifting of sacred objects, applied at the time of the diaspora as in their place of origin.”¹¹ The Yaquis described

⁷ Memorandum from Ann Follin to the Ministry of Culture on the Status of repatriation request of the Maaso Kova (12 April 2017) and letter from Ann Follin to the EMRIP secretariat of 19 March 2019.

⁸ Letter from Ann Follin to the EMRIP secretariat of 19 March 2019.

⁹ Letter from Ann Follin to Oliver Loode, UN Permanent Forum on Indigenous Issues, UNPFII (16 March 2016) and Memorandum from Ann Follin to the Ministry of Culture on the renewed examination of the case (6 May 2016).

¹⁰ Dr. Raquel Padilla Ramos in her 2017 paper on the history of the Yaquis.

¹¹ Report regarding the Maaso Kova transmitted by the Museum to the Expert Mechanism on 27 January 2020.

this period as one of forced relocation, imprisonment, and military conscription, in which the Danish sisters' acquisition of the Maaso Kova is itself evidence of the transgression of Yaqui laws regarding cultural property. The armed conflict between Mexico and the Yaquis did not end until the 1939 Decree of President Cardenas. This Decree formally settled the armed conflict between the Yaquis and Mexico with Mexico's formal recognition and restoration of the Yaqui land base and water rights in Sonora (Rio Yaqui). With this Decree the Yaquis still being held in other parts of Mexico (Yucatan, Tlaxcala, etc.) were able to return home.

The requesters and their concerns

The Yaqui are an indigenous people whose traditional territory now spans an international border, with the Pascua Yaqui living in the State of Arizona in the United States and the Rio Yaqui living in the State of Sonora in Mexico. The International Indian Treaty Council (IITC) is an Indigenous peoples' non-governmental organization with General Consultative Status to the United Nations Economic and Social Council. The IITC has been requested and authorized formally on this matter since 2003 by the Yoemem Tekia Foundation and Cultural Museum (YTF), the organization of Yaqui Cultural Leaders and participants based on the Pascua Yaqui Reservation in Tucson, Arizona, USA.

The Yaqui People, like many indigenous peoples, are organized in societies with distinct understandings of ceremonial leadership and secular leadership, along with the possibility of overlapping appointments in both realms. Moreover, the history of conquest and colonization, and interaction with state governments has complicated these issues, as evident in the Yaquis' case.

In Sonora, Mexico, there are eight pueblos (Ocho Pueblos), Vícam, Pótam, Ráhum, Huírivis, Belem, Bácum, and Cócorit. Each of the Ocho Pueblos is governed in secular terms by Traditional Authorities, and each pueblo selects a governor who generally holds office for a one year period. Generally, each of the pueblos acts autonomously. However, when there are matters that affect all of the Yaqui People, the Traditional Authorities of the Ocho Pueblos gather together for meetings and decisions. In these instances, Vicam pueblo, as "Cabecera" or head pueblo, may speak and act on behalf of all the Traditional Authorities of the Ocho Pueblos. The Government of Mexico engages with the Traditional Authorities of the Ocho Pueblos, which have also been recognized by regional bodies such as the Organization of American States.¹²

In addition, across Yaqui society, there are ceremonial societies with their own responsibilities and leadership. These include the Kolensias, Chapayekas, Pajkolas, and others. Ceremonial societies are responsible for spiritual matters, including dances, and the stewardship of cultural items related to these matters. Membership in the ceremonial societies is on ceremonial terms and is on a lifetime or otherwise extended basis. Some leaders of the ceremonial societies have also been elected as Governors of the Traditional Authorities, from time to time, showing the broad based respect they have in the communities.

With the arrival of Spanish and English to the Americas, the Yaquis were often persecuted and driven out of their territories, as during the devastating Yaqui wars culminating in 1939. Aspects of this history are described in greater detail below. At the outset, however, we note that some Yaquis took refuge in what is now the United States side of the border and their descendants constitute the Pascua Yaqui tribe. These Yaquis generally maintain their ceremonial affiliations and may be members of the ceremonial societies, while also being enrolled in the Pascua Yaqui tribe and perhaps holding elected office there. The Pascua Yaqui tribe is federally recognized by the United States.

¹² The Governors of the Traditional Authorities of the Ocho Pueblos are referenced throughout Yaqui documents, in Mexican law and policy, and in reports of the Organization of American States. See, e.g., <https://www.oas.org/en/iachr/decisions/2015/MXAD79-06EN.pdf>.

As indicated in a statement signed by their cultural leaders and authorities in May 2019, the Yaqui People agreed the Maaso Kova should be returned to authorized representatives of a Yaqui cultural society (Kolensia) in either Sonora or Arizona before both sides meet together to decide where its final resting place will be:

“We endorse the statement presented by the Yaqui cultural leaders and participants from Arizona regarding the need for the immediate return of this sacred Maaso Kova to the Yaqui homeland. It was blessed and consecrated in a deer dance ceremony and it is therefore a living being in accordance with the Yaqui culture. It should not be displayed or held in any museum. It must be returned to the authorized representatives of the responsible Yaqui cultural society the kolensia, in either Sonora or Arizona. They will then meet together to decide, without outside influence or interference, where the Maaso Kova’s final resting place will be.

We have agreed to form a Committee with Yaqui cultural leaders and participants from both Sonora and Arizona to continue to work together for the repatriation of the Maaso Kova and other items that are of similar spiritual and religious significance for the Yaqui culture.”

The EMRIP observes that the establishment of the Maaso Kova Committee is a crucial development. The Maaso Kova Committee is composed entirely by members designated by the Traditional Authorities of the Ocho Pueblos, as well as committee members from the Pascua Yaqui and is composed of persons who “hold positions of great importance within our culture and within our cosmivision”. Members represent the Cultural Societies of the Yaqui People, including the Kolensia Society, which is entrusted with the care of the Maaso Kova.

In a statement issued on 23 January 2020, the Maaso Kova Committee stated: *“we again confirm that we are of one mind and heart in our commitment that the sacred Maaso Kova should not remain in the possession of the government museum in Sweden. It must be returned to the appropriate Yaqui cultural authorities for its respectful care and wellbeing... The Maaso Kova must be returned as soon as possible directly into the hands of the designated representatives of the Kolensias from the Yaqui Pueblos. These Kolensias will need to decide among themselves, with no outside interference or intermediaries, where it should come home to finally be at rest.”*

The Yaquis have also submitted documentation showing support for repatriation from the Instituto Nacional de los Pueblos Indígenas (INPI), the agency of the Federal Government of Mexico responsible for indigenous issues. As stated at the end of this document, the EMRIP met with the Government of Mexico in February 2020 to ask some follow-up questions about Yaqui representation and understand the Federal Government’s own role in this matter.

The Maaso Kova Committee designated IITC and its Executive Director as the focal point for communications with the United Nations and the Swedish National Museums of World Culture and endorsed the country engagement process undertaken with the EMRIP. The IITC submitted additional documentation showing that Traditional Authorities from all of the Ocho Pueblos supported this request.

The Museum’s role and concerns

The Museum of Ethnography was established in 1900 and is under the authority of the Swedish National Museums of World Culture, a Government agency under the Ministry of Culture

headquartered in Gothenburg. The National Museums of World Culture “is responsible for displaying and bringing to life the various cultures of our world, in particular cultures outside of Sweden. Furthermore, the agency is to document and illustrate different cultural manifestations and conditions as well as cultural encounters and variations from a historical, contemporary, national and international perspective. Finally, the agency shall promote interdisciplinary knowledge and various forms of public activities.”¹³

Accordingly, the Museum worked in good faith for many years to understand the significance of the Maaso Kova on its own and in the context of its larger collection of Yaqui items. The Museum and its staff have conducted multiple extensive reviews of the documentation around the collection, visited Yaqui communities in Sonora and Arizona, and responded to the requester’s inquiries. The Museum has long worked with its counterpart in Mexico, the National Institute of Anthropology and History (Instituto Nacional de Antropología e Historia – INAH) through which it has obtained contacts with Yaqui People, as well as the advice of anthropologists and historians on the Yaquis. In conjunction with a larger research project on Yaqui materials, the Museum has invited various Yaqui delegations and individuals to attend meetings in Sweden. For example, the requesters were invited to one such meeting in 2019, but they declined to attend when informed that the topic would not be repatriation of the Maaso Kova. Through these contacts and exchanges, the Museum has demonstrated its awareness of the complexities of the situation and expressed certain concerns.

One of the key concerns of the Museum has to do with representation of the Yaqui People in both Mexico and the United States. Understandably, the museum would not wish to repatriate an item without assurances that it is returning it to the correct parties.

As stated above, the requesters submitted documentation showing the establishment of the Maaso Kova Committee, with members of the ceremonial societies of the Yaqui People (including Kolensias, Chapayekas, Pajkolas), bringing together individuals from both Rio Yaqui and Pascua Yaqui, some who have previously also served as Governors of the Traditional Authorities. Additionally, the current Governors of the Traditional Authorities of the Ocho Pueblos all signed a letter supporting repatriation and designating the Maaso Kova Committee in this matter.¹⁴ As further explained below, the EMRIP met with the Mexican Government on 28 February 2020, which indicated its recognition of the Governors of the Traditional Authorities, and awareness of the Maaso Kova Committee.

In terms of the procedures for repatriation, the Museum explained the following:

- The Swedish Museum Act (§ 5 2017: 563)¹ states that museums within the general museum system have the controlling influence over their activities. The state museums themselves are responsible for their collection management and are instructed to assess, among other things, if there is reason to dispose of items by repatriation. Following an official request by an external party to a state museum regarding claims for return, the museum makes its assessment based on both legal and professional criteria.
- The National Museums of World Culture have a repatriation council which handles all requests for a return. When a case for repatriation is opened, provenance research is carried out as well as an investigation on how the specific object ended up in the collection. All findings are documented and communicated to the claimants. It is the NMWC’s sincerest intention that this work is transparent, efficient and handled correctly.

¹³ Website of the Swedish National Museums of World Culture (<http://www.varldskulturmuseerna.se/en/the-government/the-national-museum-of-world-cultures/>)

¹⁴ Letter from the Traditional Authorities of Vicam Pueblo, In their capacity as “Cabecera” (capital) of the Ocho Pueblos addressed to EMRIP on 8 December 2019. Statement of the Maaso Kova Committee of 23 January 2020.

- If the museum considers that a return should be carried out, the museum sends a petition to the Ministry of Culture.
- After the case is prepared by the Ministry of Culture, the Government makes the decision whether or not the museum may dispose of the state property.

This information clarified a concern of the requesters concerning the perceived lack of involvement of the Swedish Government. Consultations by EMRIP with the Permanent Mission of Sweden in Geneva and with the Yaqui People in Mexico and the United States led to greater clarity regarding the institutional and legal specificities on both sides. With respect to Sweden, through informal consultations, as well as a formal letter, the Permanent Mission made it clear that the National Museums of World Culture was the State authority responsible for the request of repatriation of the Maaso Kova. As the Museum pointed out, according to Swedish law “any decision to return a cultural object is made by the Swedish Government, after thorough investigation, in line with current legislation and conventions, made by the museum agency.”¹⁵

The Museum has shown an interest and openness in moving further on this case, stating that it is “of the utmost importance that the Yaqui Nation comes to a consensus regarding the Maaso Kova as well as the rest of the collection originating from the Yaqui People”. They pointed out that “in the past few years we have tried to conduct a transparent dialogue in collaboration with all parties involved in this issue”.¹⁶ The Museum emphasized its desire to work together with the Yaqui People “to develop knowledge on the history of the collections and to establish a long lasting partnership”¹⁷. The Museum also stated that it is “open to dialogue on alternative interpretations. Should additional documentation be found elsewhere, these must naturally be analysed”.¹⁸

Rationale for repatriation under the Declaration and other sources of international law

United Nations Declaration on the Rights of Indigenous Peoples – Articles 11, 12 and 31.

The United Nations Declaration on the Rights of Indigenous Peoples is the most comprehensive international instrument on the rights of indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.

Several articles in the Declaration directly invoke the rights of indigenous peoples to maintain and protect their cultural heritage, and to repatriation of this heritage where it has been taken away from them. Article 11 expresses the right to maintain and protect cultural artefacts, and includes a State obligation to provide redress, which may include restitution, when cultural property has been taken without free, prior, and informed consent. Article 12 affirms indigenous peoples’ right to use and control their ceremonial objects, such as the Maaso Kova, and the responsibility of States to enable the access and repatriation of ceremonial objects in their possession through fair mechanisms developed in conjunction with the concerned indigenous people. Article 31 affirms indigenous peoples right to maintain, control, protect and develop their cultural heritage. These articles read as follows:

¹⁵ Letter from Ann Follin to the EMRIP secretariat of 3 March 2019.

¹⁶ Letter from Ann Follin to the EMRIP secretariat of 3 March 2019. In 2016, a delegation from Sweden including Ann Follin, Director General of the Swedish Museums of World Culture and Adriana Muñoz, a curator at the Museum, visited the Pascua Yaqui Indian Reservation in Arizona. The visit included discussions, presentations and personal testimony regarding the Maaso Kova’s place in Yaqui society.

¹⁷ Memorandum from Ann Follin to the Ministry of Culture on the Status of repatriation request of the Maaso Kova (12 April 2017).

¹⁸ Report regarding the Maaso Kova transmitted by the Museum to the Expert Mechanism on 27 January 2020.

Article 11

(1) Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

(2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

(1) Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

(2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 31

(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

(2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Previous to the dialogue between the parties, one of the main challenges to applying Article 11.2 was developing a common understanding of the circumstances surrounding the Maaso Kova's acquisition. The record is almost 100 years old, is ambiguous on certain facts, and can be read to reflect differing worldviews.

The Museum's understanding was that the Maaso Kova was acquired in a consensual transaction that did not violate any law. A letter from Gösta Montell to Museum Director Gerhard Lindblom, dated 11 December 1934, stated "We even managed to purchase some of the dance attributes and we hope to get more in the future." Yet is not clear whether these attributes included the Maaso Kova. The Maaso Kova is listed with a value of USD10 in the contents of a trunk shipped from Mexico to Sweden in 1937.

The Yaquis noted, however, that their ancestors in Tlaxcala were limited by the conditions of their military conscription and the Yaqui War, and that Yaqui law would have prohibited alienation of the Maaso Kova.

Given the difficulty of this history, the Expert Mechanism noted that Article 12.2 makes no reference to the circumstance under which artefacts were obtained. It focuses on the right of indigenous peoples

to the use and control of their ceremonial objects, and should be viewed as an encouragement to the Museum to support repatriation.

The dialogue between the Museum and the Yaquis could be seen as a “fair, transparent and effective mechanism developed in conjunction with indigenous peoples concerned,” pursuant to Article 12.2. It is important for such a process to allow the parties to talk openly and respectfully regarding solutions for the future care and disposition of an item that is important to both of them.

The Hague 1954 and UNESCO 1970 conventions and their applicability

Mexico and Sweden are both parties to the 1954 Hague Convention providing for the protection of cultural property during armed conflict and the UNESCO 1970 Convention on the means of prohibiting and preventing illicit import, export and transfer of ownership of cultural property. While there have been no claims by the state parties under these Conventions, they can help inform relevant norms.¹⁹ Neither Convention was in force in 1934 when the Maaso Kova was acquired, nor do they apply retroactively. Yet the Hague 1954 Convention reveals norms in favour of repatriation, with special attention to the vulnerability of cultural property belonging to parties at war, as the Yaquis were, and cooperation among state parties, including those who may have held certain cultural properties in “safe keeping”. Article 15 of the UNESCO 1970 Convention encourages state parties to engage in “special agreements” regarding the restitution of cultural property before the entry into force of the Convention.²⁰

Thus far, the relevant states have not resorted to these Conventions in this matter. However, the Government of Mexico through its federal Indigenous Affairs agency (Instituto Nacional de los Pueblos Indígenas) (“INPI”) has expressed its support for restitution to the Yaqui People, and more specifically the Kolensias in either Sonora or Arizona.²¹ As stated at the end of this note, Mexico’s Foreign Affairs Ministry, on 28 February 2020, indicated its willingness to engage with Sweden and the Yaquis regarding repatriation in this matter, and to coordinate domestically with INPI, INAH, and other agencies.

Given the posture of the state of Mexico, the uncertainties in the record on certain points, and the ongoing spiritual and cultural needs of the Yaqui People, a case could be made for a return to the Yaqui People for ethical reasons.

The case for repatriation appears consistent with the *Guide to Return and Repatriation for Swedish institutions* (working title) currently being developed by Sweden’s National Heritage Board’s (Riksantikvarieämbetet), which references repatriation for “special ethical reasons”.²² Special ethical reasons may include not only that the Maaso Kova is a ceremonial object pursuant to the Declaration, but also that the Maaso Kova was acquired in Tlaxcala, to which the Yaquis had been removed by Mexico during the Yaqui Wars.

¹⁹ See also UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995.

²⁰ The spirit of Articles 12, 13 and 15 of the Convention support repatriation in a number of instances. Article 12 requires state parties to “respect” the cultural heritage within the territories for which they are responsible and take appropriate measures to prohibit and prevent the illicit import, export and transfer of cultural property in those territories. Article 13 imposes an obligation on state parties to cooperate in “facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner” and “admit actions for recovery lost or stolen items of cultural property brought by or on behalf of the rightful owners.” Article 15 allows for “special agreements,” albeit by state parties, for items acquired after the Convention’s effective date.

²¹ Letter from Adelfo Regino Montes, Director General of the Instituto Nacional de los Pueblos Indígenas, to H.E. Stefan Löfven, Prime Minister of Sweden, 3 July 2019.

²² Report regarding the Maaso Kova transmitted by the Museum to the Expert Mechanism on 27 January 2020.

While the Museum states that the Yaquis enlisted in the army, which had a Yaqui General, the Yaquis consider that they were forcibly conscripted during this time. Given the different understandings, EMRIP asked the Yaquis some follow-up questions. The Yaquis then submitted a written testimony from Mr. Camilo Flores Jimenes, who was born in Tlaxcala in 1933 and is the son of Salomón Flores Vásquez, a Yaqui soldier serving under General Amarillas in the “Fieles de Huiribis” battalion. Mr. Flores spoke of the strained relationship between General Amarillas and the traditional authorities, and also stated that the Mexican Army considered that battalion to be composed of “prisoners of war”.

The EMRIP observes that the conditions of the Yaquis when the Maaso Kova was acquired reflect the salience of the global community’s general concerns about the vulnerability of cultural property during times of war or occupation. In these respects, the record supports repatriation to remedy these harms.

Meeting with the Foreign Relations Ministry of Mexico

In phone calls preceding the Vancouver meeting, the Museum raised questions about the roles of Mexican federal agencies (INPI and INAH) in this matter, and emphasized the need to thoroughly verify the Yaquis’ representation in this matter. It is worth clarifying that INAH was the Museum’s initial contact, and that the Museum only established contact with INPI in December 2018. The Yaquis raised questions about how repatriation would occur as a practical matter.

EMRIP addressed these questions in communications and meetings with the Mexican Federal Government. EMRIP held a phone call with staff of the Permanent Mission of Mexico to the United Nations in Geneva, who referred EMRIP to the Department of Public International Law in the Ministry of Foreign Affairs (Secretaría de Relaciones Exteriores –SRE). EMRIP was able to schedule an in-person meeting with the Department of Public International Law, including its Coordinator, on February 28, 2020, in Mexico City. The Department indicated familiarity with this matter, knowledge of the Traditional Authorities of the Ocho Pueblos and the Maaso Kova Committee, and willingness to consult and coordinate with INPI and INAH regarding this matter. Among other things, the Coordinator of the Department stressed that the Mexican Federal Government has a role in facilitating customs and other aspects of international repatriations.

Dialogue held on 6 March 2020

Both parties attended a one-day dialogue facilitated by EMRIP on 6 March 2020 in Vancouver, Canada, on the margins of an expert seminar on repatriation hosted by the University of British Columbia. This dialogue was instrumental in reaching outcomes that were agreeable to both parties.

The requesters were represented by the following delegation:

- Andrea Carmen, Executive Director of the International Indian Treaty Council and member of the Yaqui Nation
- César Cota Tórtola, Co-President of the Maaso Kova Committee, former Tropa Capitan, Loma De Guamuchil, Rio Yaqui Sonora
- Juan Gregorio Jaime León, Kolensia, Former Traditional Authorities Governor, Huírivis Pueblo, Rio Yaqui Sonora
- Mariano Ochoa Millán, Vocero de la Tropa, IITC Board member, former Traditional Authorities Governor, Torim Pueblo, Rio Yaqui (via videoconference)
- Ángel R. Valencia, Pajkola de la Kolensia, New Pascua Pueblo, Arizona
- Peter Yucupicio, Vice Chairman, Pascua Yaqui Tribe, member of the Maaso Kova Committee, Chapayeka/Soldiers Society, Old Pascua Pueblo, Arizona

The National Museums of World Culture were represented by:

- Director General, Ann Follin
- Deputy Director General Karl Magnusson, PhD

The dialogue was facilitated by Kristen Carpenter and Megan Davis, respectively Chair and Vice-Chair of EMRIP, with support from the Office of the UN High Commissioner for Human Rights in its capacity as secretariat to EMRIP. Together with the EMRIP, the Museum and the Yaqui representatives discussed in a respectful, constructive way, some of the key issues facing them. The parameters of the dialogue included a promise of confidentiality regarding the specifics of the discussion. As a general matter, the parties acknowledged the need to handle the request in accordance with applicable national legislation and international legal instruments, as well as the sensitivity of the historical, cultural, and spiritual matters before them. They ultimately focused on current ethics and shared values, including a common commitment to improve their relationship, understanding, and cooperation going forward. The dialogue culminated in the agreement stated at the outset of this notes.

Conclusion

Throughout this engagement, the Yaqui People and the Museum both demonstrated an exemplary willingness to embrace the current global shift towards a human rights approach in the relationship between museums and indigenous peoples. The Expert Mechanism stands ready to support them in the repatriation process.